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Supreme Court, U.S.
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No. 03-1365

IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

v.

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Jurisdiction on a Petition for Writ of Certiorari from a state court is controlled by 28 U.S.C. § 1257(a).[1]

INTRODUCTION

This appeal challenges the punitive damages component of a judgment rendered against Petitioners in a malicious prosecution case, predicated on a civil action, which the trial judge described as one of the worst cases of malicious litigation he had ever seen. The ratio of punitive to compensatory damages is less than 4:1.

None of the Rule 10 considerations governing review of certiorari petitions apply in this case. The New York appellate courts did not decide a federal question. Rather this case touches upon constitutional issues *only to the extent that* precedent from the Supreme Court was incorporated into the jury instruction and was then considered by the trial court and the Appellate Division, both of which applied the U.S. Supreme Court precedent to the facts of this case in reviewing the jury verdict. There was never a dispute regarding the construction, or the interpretation, of the due process clause or of any U.S. Supreme Court precedent.

This petition for certiorari should be denied because: the order from which petitioners appeal is not final; petitioners failed to preserve the points for appeal; and, despite Petitioners' claim that the New York Appellate Division "failed to consider" their arguments, in fact, all the issues were fully aired before that court. The punitive damages awarded in this case were reviewed on multiple occasions and determined to be in accord with the holdings in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

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1. Petitioners incorrectly assert jurisdiction based on 28 U.S.C. § 1254. That section refers to appeals from the U.S. Courts of Appeal.

COUNTER-STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, in the name of Takara International, Inc., ("Takara International"), maliciously initiated a lawsuit in New York, (the "underlying case" or "Takara International case") against Mitsuhiro Honzawa, ("Mitsuhiro"), falsely alleging that he had "embezzled" from the family businesses, as a pretext by which Petitioners could convince other family members and business and banking associates in Japan and New York that Mitsuhiro should be ousted from the family businesses.

To explain the malice behind Petitioners' decision to file the underlying case requires a digression to describe the Honzawa family businesses and the history of the funds that Mitsuhiro was accused of stealing.[2]

A. The Honzawa Family Businesses

For more than 30 years, Mitsuhiro and his brother, Hirokuni Honzawa ("Hirokuni"), operated the family businesses as partners, with side-by-side desks in a single office in Tokyo, Japan. RA1319-25.[3] Their father had established the business, and Hirokuni and Mitsuhiro expanded the real estate holdings to include various warehouses in Japan and numerous properties in the United States. By 1995, the business had a net worth of $3.5 billion. RA1325-27.

In 1995, Hirokuni's two sons, Masahiro and Yukihiro, were in their mid-twenties, and it was agreed to put them into the family business as "trainees," much the same as Mitsuhiro and

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2. For purposes of responding to the Petition, details concerning the disputed funds are, largely, irrelevant. Because, however, Petitioners have continued to misrepresent the facts and because the history of the funds shows the utter lack of probable cause in the underlying litigation, and hence the level of malice and reprehensibility of Petitioners' actions, a rendition of these facts is necessary. A detailed summary of the evidence presented at the malicious prosecution trial was attached to Respondents' Opposition to the Petitioners' Motion for Leave to Appeal submitted to the New York Court of Appeals and is reproduced in the Appendix at 8A-16A.

3. References to the Record on Appeal as filed with the New York Appellate Division are designated by "RA."

Hirokuni had been trainees together under their father. RA1095. Unbeknownst to Mitsuhiro, however, Hirokuni and his sons had previously discussed removing Mitsuhiro and replacing him with the nephews. RA1196-99. In April 1995, Yukihiro came to the U.S. to begin training under Mitsuhiro, but in an introductory dinner meeting with important Japanese bankers, Yukihiro was extremely disrespectful toward Mitsuhiro, which incensed Mitsuhiro. RA1393-94. In June 1995, Mitsuhiro and Hirokuni discussed the incident. Their mother had suggested that Mitsuhiro take a leave of absence and Mitsuhiro agreed to take some time to "cool off." RA1367, 1705-1707.

B. The Hong Kong Accounts

Mitsuhiro and Hirokuni maintained personal funds in bank accounts and other investments in Hong Kong. RA1305-07, 1343-45. The genesis of the Hong Kong money was approximately $2 million in cash that the brothers had taken from Tokyo to Hong Kong, in the late 1970s and early 1980s, and deposited to interest bearing accounts. RA1305-07. By August 1995, the cash, plus accrued interest, totaled nearly $5.5 million. RA1959-60. All of this money was held in accounts in the name of a family friend, who was a Hong Kong resident, although the money actually belonged to Hirokuni and Mitsuhiro. RA1306. Significantly, the Hong Kong money was never in an account in the name of Takara International (RA1305) and money in the accounts did not have, and had never had, a connection to Takara International. RA1305.

Because of the disagreement he had had with his brother and his nephews, in August 1995, Mitsuhiro traveled to Hong Kong and withdrew his half of the money (approximately $2.2 million) and deposited this money to an account in his own name at the Hong Kong office of a Liechtenstein bank. RA1365-66. Petitioners' claim that Mitsuhiro took this action "secretly" and that Hirokuni was hospitalized at the time, but there is no citation to any evidence to support these claims, and Mitsuhiro testified that he was unaware of Hirokuni's hospitalization, if it occurred. RA1367.

The underlying Takara International case conclusively determined that the funds transferred by Mitsuhiro were his personal funds and had no connection with Takara International. Nonetheless, Petitioners continue to refer to the Hong Kong money transferred by Mitsuhiro as "corporate funds" (Petition at 3) without citation in the record and despite a complete absence of any evidence to support their claim.

C. Facts Leading To Filing Of The Underlying Case

In September 1995, after the "cooling off" period, Mitsuhiro returned to work on a regular basis at the offices of the family business. RA1361. As a result of Mitsuhiro's return, Hirokuni and his sons needed to concoct another plan by which Mitsuhiro would be forced out of the family businesses. They implemented a plan to fabricate a claim that, by transferring his funds from the Hong Kong accounts, Mitsuhiro had embezzled company funds and, on that basis, they would convince other family members, long-term company employees, bankers and other business associates that Mitsuhiro should be terminated from his positions with the family businesses.

In October 1995, before the underlying case was filed, Hirokuni, with his wife and son, met with the family friend in Hong Kong for several days and they discussed the Hong Kong accounts and the money Mitsuhiro had transferred. RA1217-18, 1694-95. From these meetings, Hirokuni necessarily knew that Takara International had no accounts in Hong Kong and that the origin of the Hong Kong funds could be traced to the cash transfers in which Hirokuni had participated. RA1184-85, 1695.

In early November 1995, Mitsuhiro told his brother that he was no longer willing to allow the nephews to be trainees. In addition, an attorney representing Mitsuhiro, called upon Hirokuni to discuss arrangements for dividing the family businesses into two parts. RA1477.

In response, Hirokuni and his family began to claim that Mitsuhiro had stolen the Hong Kong money from Takara International. RA1224, 1709-11. On November 14, 1995, without notifying Mitsuhiro, Hirokuni convened and presided

over a directors' meeting of the Japanese family businesses at which their mother made a motion for Mitsuhiro's removal because of the "theft" and authorized the Takara International lawsuit to be filed to recover the "stolen" funds. RA1708-09, 1711, 1182.

D. The Takara International Litigation

Immediately thereafter, in the name of Takara International, the underlying case was filed in New York, by which the Petitioners formally called Mitsuhiro a thief and claimed that he had stolen money from Takara International. RA965, 2155. (Petitioners incorrectly state that this was a "replevin" action. In fact, the suit was a tort action alleging three causes of action – conversion, breach of fiduciary duty and fraud. RA2155-58.) Soon thereafter, nearly identical suits were filed in Liechtenstein and Hong Kong.

In New York, Petitioners attached approximately $250,000 in Mitsuhiro's personal bank account, despite their knowledge that the account had no connection to the Hong Kong funds transferred by Mitsuhiro. In Liechtenstein, Petitioners attached Mitsuhiro's $2.2 million in the Liechtenstein bank. The case was removed to the U.S. District Court for the Southern District of New York, where, over the course of a year, Petitioners were given repeated opportunities to demonstrate the merits of the case. In December 1996, the New York attachment was dismissed because Petitioners could not substantiate their claims or show a likelihood of success on the merits. RA1011.

In the spring of 1997, after a trial date was scheduled in the New York case, Petitioners agreed to dismiss the Liechtenstein case and to move the attached funds ($2.2 million) to the U.S. pending further order of the U.S. court. RA1030. Despite repeated demands and a complete absence of evidence to support their claims, the Petitioners continued to refuse to release the attached funds. RA1030-32, 2280, 2286.

The case went to trial in September 1997. In opening statement, counsel for Takara International admitted that, despite the allegations in the complaint and the accompanying

affidavits, he could not connect Takara International to the funds in Hong Kong. RA1602-03. Petitioners presented no evidence in support of their allegations. At the conclusion of the evidentiary phase of the trial, the trial judge, Hon. John Sprizzo, released the $2.2 million that had been held. RA1039. After final argument, Judge Sprizzo

> ruled that the case was appropriate not only for Rule 11 sanctions but a sizable award of damages resulting from the improvident seeking of injunctive relief and the continuation of this application long after it had been reasonably clear to a lawyer of ordinary intelligence and ability that the case should have been dropped much sooner.

Honzawa v. Honzawa, 268 A.D.2d 327, 701 N.Y.S.2d 411, 413 (1st Dept. 2000) ("*Honzawa I*"). Sanctions of $550,000 in legal fees were paid, with a specific agreement to allow a malicious prosecution case to proceed. (Petitioners' claim at page four that the parties "negotiated damages" for "wrongful attachment" is not an accurate description of what transpired and is not supported by the record.)

E. The Malicious Prosecution Case

In June 1998, Mitsuhiro and his wife filed the malicious prosecution action in New York state court against Hirokuni, Hirokuni's family members, the Honzawa family New York corporations, which had paid for the underlying litigation, and the three law firms that had represented Takara International.

The state court judge, Justice Ira Gammerman, initially dismissed the case, but that decision was reversed on appeal. *Honzawa I, supra.*

The malicious prosecution case ensued and went to trial in March 2002.[4] Even on the eve of trial, Justice Gammerman

4. Petitioners' references to a claim for "reputational harm" (e.g., Pet. at 4, 5, 8) are both nonsensical and not supported by the record. Having asserted a tort claim, Respondents sought the usual tort damages: emotional distress, damage to reputation and economic loss. The citation provided by Petitioners (Pet. Appx. 51a-53a) is the passage where the trial court ruled that evidence of harm to Mitsuhiro's reputation could only be presented by testimony from witnesses, and not from Mitsuhiro or his wife, but the (Cont'd)

expressed skepticism about the merits of the case. RA55. After he had heard all of the evidence, however, Justice Gammerman made a 180-degree turn and concurred with the opinion of Judge Sprizzo. Pet. Appx. at 8a.

This Court's precedent was first raised in this case by Justice Gammerman, on his own initiative, as he was preparing the jury charge at the conclusion of the evidentiary phase of the trial. RA1990. At that time, Justice Gammerman expressly stated his intention to modify the standard jury instruction on punitive damages to reflect the U.S. Supreme Court precedent. RA1997-98. Petitioners' *never* objected to the proposed instruction or to the instruction as given and *never* requested an alternative instruction or a modification of the proposed instruction. RA2119-21. (The punitive damages instruction is at RA2114-16, reproduced in Respondents' Appendix at 3A-6A.)

On March 21, 2002, the jury rendered a unanimous verdict in favor of plaintiffs and assessed the following amounts as damages:

American lawyers' fees	$1,148,763.
Japanese lawyer's fees	$691,667.
Mitsuhiro's emotional distress	$1,131,250.
Mrs. Honzawa's loss of consortium	$900.000.
Punitive damages	$50,000,000.

On a post-trial motion to set aside the verdict, the trial court upheld the finding of liability, upheld the award of legal fees, set aside the emotional distress damages and the

(Cont'd)
trial court expressly allowed proof of emotional distress. As a result of the ruling, Mitsuhiro could not prove "harm to reputation" because he could not bring to New York for the trial a succession of witnesses from Tokyo. While Mitsuhiro did not agree with the ruling, given the damages awarded by the jury for emotional distress, he did not challenge that ruling on appeal. The other citation provided by Petitioners (Pet. Appx. 23a) is the passage from the post-trial order denying damages for emotional distress. This decision was reversed by the Appellate Division. These rulings concerning damage to Mitsuhiro's reputation do not, in any manner, impact, and are wholly irrelevant to, the review of the punitive damage portion of the judgment.

consortium damages, and remitted the punitive damages to $10,000,000. Mitsuhiro accepted the remittitur and judgment was entered September 12, 2002, in the amount of $11,622,243.

The post-trial motions (RA2496, RA2710, and RA2577) cited and relied upon the decisions of this Court. The order deciding the post-trial motions discussed the ratio of compensatory damages to punitive damages and stated that the amount of punitive damages was reduced, primarily, because of the reductions (later reversed by the Appellate Division) that had been made in the post-trial ruling. Justice Gammerman expressly relied upon, and cited to, this Court's precedent. Pet. Appx. at 27a-29a.

F. The Appeal to Appellate Division

Petitioners appealed the judgment to the Appellate Division. Because Petitioners appealed after the remittitur had been accepted, Respondents were entitled to cross-appeal. N.Y. Civil Practice Law and Rules ("CPLR") § 5501(a)(5). So, Respondents appealed the trial court's remittitur order and the vacature of damages for emotional distress and loss of consortium. Shortly before Respondents filed their brief, this Court rendered its decision in *State Farm*. As a result, both sides fully briefed the holding of *State Farm* to the Appellate Division. *See* Respondents' Brief, Petitioners' reply brief, and Respondents' reply brief.[5]

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5. Petitioners made two appeals to the Appellate Division after the trial. The first occurred after entry of the judgment in September 2002. The second came in May 2003, more than a year after the malicious prosecution trial had concluded. The second appeal arose from Petitioners' motion to set aside the verdict based on the outcome of a Japanese appellate court decision. (*See* discussion at p. 10 *infra*.) In opposing the motion, Mitsuhiro argued that the Japanese decision directly contradicted an earlier decision involving a family partnership, named Keigyosha, which is owned equally by Mitsuhiro and Hirokuni and which owns part of all the Honzawa family corporations. Justice Gammerman ruled that the outcome of the Japanese appeal was not relevant to the case, and that Petitioners could have submitted any such evidence at trial but chose not to do so. He also stated that the Japanese ruling may have signified only that Petitioners had finally accomplished, through legal means, what they had been trying to accomplish "extra legally." Record from Appeal to Appellate Division based on denial of Motion To Vacate, RA15. The motion was denied and

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The five-judge Appellate Division panel rendered a unanimous decision that increased the punitive damages to $15 million and reinstated damages for emotional distress and loss of consortium. *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29 (1st Dept. 2003), *appeal dismissed*, 1 N.Y.3d 546, __ N.E.2d __ (2003), *leave denied*, __ N.Y.3d __, __ N.E.2d __ (2004). Pet. Appx. at 4a-7a. In reviewing the punitive damage portion of the judgment, the Appellate Division expressly relied on this Court's holdings in *State Farm*, *BMW*, and *Cooper Industries*. The Appellate Division found that: "[Respondents] established that Petitioner Hirokuni Honzawa's animosity towards his brother was the motivation for [Petitioners'] commencement of a wholly meritless lawsuit and the attachment of Mitsuhiro Honzawa's accounts" and that such "[r]eprehensible conduct warrants the award of punitive damages." Noting that the purpose of punitive damages is to punish the offender and deter similar conduct on the part of others, the Appellate Division increased the punitive damage award to an amount it deemed appropriate in light of the millions of dollars Petitioners spent on legal fees, which had had no deterrent affect, and the enormous wealth of the Petitioners, which had allowed the Petitioners to act so reprehensibly and without any financial constraints.

G. The Appeal Of Right Was Dismissed

After the Appellate Division decision, Petitioners had two further appellate options: (1) an "appeal of right" pursuant to CPLR § 5601 or (2) an "appeal by permission" pursuant to CPLR § 5602. Petitioners chose to seek only an "appeal of right" to the New York Court of Appeals, pursuant to CPLR § 5601(b)(1), claiming this case directly involved the

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Petitioners appealed. The second appeal was joined with the main malicious prosecution appeal and the Appellate Division affirmed Justice Gammerman's decision in the same order from which the Petitioners now appeal. The second appeal was then included in the Petitioners' attempt to appeal to the New York Court of Appeals. That appeal was dismissed by the Court of Appeals' December 23, 2003 and April 1, 2004 orders, as being non-final, and therefore not reviewable by that court. (*See* discussion of the Court of Appeals rulings at Sections G and H, *infra*.)

interpretation of a constitutional provision. Immediately after the notice of appeal was filed, the Court of Appeals responded with a letter directing Petitioners to justify their claim of jurisdiction. Both sides filed memoranda and, on December 23, 2003, the attempted appeal was dismissed for lack of jurisdiction. Petitioners' Appendix at 1a. It is that order upon which Petitioners base this certiorari petition.

H. The Appeal By Permission Was Denied

Under New York procedure, upon dismissal of the attempted "appeal of right," Petitioners had the right to pursue a second appellate option and, on January 22, 2004, Petitioners filed a motion for leave to appeal pursuant to CPLR § 5602(a)(1). On April 1, 2004, the Court of Appeals denied the motion in all respects. *See* Respondents' Appendix at 1A.

Concerning punitive damages, Petitioners based their motion on two issues. First, they argued about the sufficiency of the evidence of Petitioners' wealth as presented at trial, and they sought to argue – for the first time in the history of this case – that wealth could not be considered as a factor in assessing punitive damages. Second, Petitioners sought to appeal on the ground that the Appellate Division had failed to apply the "guideposts" set forth by this Court "for independent proportionality review of punitive damage awards." *See* Petitioners' Motion for Leave to Appeal to the New York State Court of Appeals at 7.

THE JAPANESE DECISIONS

In what can only be described as one final improper litigation tactic, Petitioners defy the rulings of the Appellate Division and the New York Court of Appeals and ignore the rules of this Court, by including in their petition claims regarding Japanese litigation which are not in the record and which were expressly excluded by the lower courts from the record. *It is not through inadvertence that the Petitioners repeated reference to the Japanese litigation contains no citation to the record.*

First, such matters should not be considered by this Court because the outcome of the Japanese litigation is not, and has never been, a part of the record in this action. These claims,

and the effort to improperly inject these matters into the record, were made before, and rejected by, the trial court, the Appellate Division and the Court of Appeals. *See* note 5, *supra*. Second, as was previously argued to, and decided by, the trial court, the Appellate Division and the Court of Appeals, the outcome of the Japanese litigation is not relevant to the malicious prosecution case. Even if Petitioners had preserved the issue for appeal, which they did not, the malice inherent in initiating and continuing the baseless underlying Takara International case remains. Using the New York litigation for their ulterior motives was malicious regardless of the success or failure of the parties in other disputes. Finally, Petitioners' statements omit reference to other cases in Japan in which Mitsuhiro prevailed and a case which is still pending.

THE PETITION MUST BE DENIED BECAUSE THE ORDER APPEALED FROM IS NOT FINAL

The December 23, 2003 order from the New York Court of Appeals, from which the petitioners based their appeal, is not a final order and, therefore, this Court cannot grant the petition for certiorari.

To be reviewable by the Supreme Court,

> a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) (quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); MOORE'S FEDERAL PRACTICE, § 406.03.

The Supreme Court lacks jurisdiction if the petitioner fails to ask the state high court to review the decision, even if further review is discretionary. *Stratton v. Stratton*, 293 U.S. 55 (1915).

The finality requirement rule serves several ends:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota St. Bd. of Pharm. v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

In this case, the appeal to the Appellate Division resulted in the unanimous October 21, 2003 decision. Pet. Appx. at 4a-7a. Petitioners "appeal of right" pursuant to CPLR § 5601(b)(1) was dismissed by the order of December 23, 2003, (Pet. Appx. at 1a-3a), and it is from that order Petitioners have appealed to this Court. On January 22, 2004, however, Petitioners filed a motion with the New York Court of Appeals seeking leave to appeal to that court pursuant to CPLR § 5602(a)(1). That motion was pending at the time the petition was filed.

A decision from the New York Court of Appeals that dismisses a CPLR § 5601 appeal is a dismissal for lack of jurisdiction.[6] It is not a final order of New York's highest court, where the Petitioners have either failed to pursue the "appeal by permission" option or where the "appeal by permission" option has not been decided by the Court of Appeals as of the time the petition is filed. *Gotthilf v. Sills*, 375 U.S. 79 (1963). *See also* MOORE'S FEDERAL PRACTICE, § 406.04[1][b].

At the time the certiorari petition was filed, there was not a final order in the case. Petitioners' motion seeking leave to appeal, which was pending at the time Petitioners filed this certiorari petition, is more than sufficient evidence that the December 23, 2003 order was not, and is not, final. Finality is

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6. Petitioners admit that the dismissal was on jurisdictional grounds. "The Court of Appeals dismissed the appeal on the jurisdictional ground . . ." Pet. Appx. at 6a (¶10).

determined as of the time the certiorari petition is filed. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942)[7]

Accordingly, because the December 23, 2003 order of the New York Court of Appeals was not, and is not now, a final order, the petition for certiorari must be denied.

IF THE PETITION IS CONSIDERED ON ITS MERITS, A WRIT SHOULD BE DENIED

The amount of punitive damages awarded in this case was amply justified by the malicious conduct of the Petitioners, whose conduct was found to be particularly reprehensible by every judge who has reviewed the facts. The ratio of punitive damages to actual damages is less than 4:1. The amount of punitive damages is less than 3 times the amount Petitioners spent in legal fees pursuing the underlying malicious prosecution, and, the Petitioners' actions were motivated by personal malice.

Petitioners argue that the Appellate Division did not give them a *de novo* review of the punitive damage award and "failed to consider" this Court's decisions, but that position is demonstrably false.[8] The judgment was reviewed *repeatedly* in accordance with this Court's decisions and it fully comports with due process.

The first "review" actually occurred *prior to the verdict*, when the trial judge, on his own initiative, modified the standard New York jury instruction to reflect appropriate U.S. Supreme Court precedent. (Petitioners did not object to the instruction, which allowed the jury to consider wealth.) The second review came on post-trial motions, when the trial

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7. Petitioners do not argue that any of the narrow exceptions to the finality rule apply. If the New York Court of Appeals had granted Petitioners' motion for leave to appeal, it would have conducted a review of the judgment that is nearly identical to the review sought by the Petitioners in this appeal. Thus, none of the exceptions to the finality rule would be applicable.

8. For example, Petitioners admit that, in their appeal to the Appellate Division, they raised the due process arguments and relied upon the "constitutional guideposts" set forth in *BMW*, *Cooper*, and *State Farm*. Pet. at 6 (¶ 9).

judge made a substantial reduction in the award. A third review came in the Appellate Division, which reviewed the facts and precedent, and in a unanimous decision, adjusted the award accordingly. A fourth and fifth review occurred in the Court of Appeals: one on the first attempted appeal "as of right," and another on the attempted appeal by permission.

These reviews have certainly satisfied the requirements of "due process" and, thus, the writ should not be granted.

ISSUE I.

The Appellate Division Fully Considered The Proportionality Of The Harm Suffered By Respondent And The Amount Of Punitive Damages

Although Petitioners repeatedly assert that the "Appellate Court failed to consider" a particular point, what they actually mean is that the courts below considered these precise points and disagreed with the Petitioners' arguments. In their briefs to the Appellate Division, both sides cited, discussed and relied upon the U.S. Supreme Court decisions, including the decision in *State Farm*. Oral argument before the Appellate Division focused almost exclusively on the U.S. Supreme Court precedent.

The Appellate Division cited to, and relied upon, the very precedent from this Court that the Petitioners argue was "not considered." It is clear that the Appellate Division took a fresh look at the case and the guideposts outlined by this Court. In an application of that precedent, the Appellate Division concluded that, consistent with due process, the facts of this case warranted an increase in the amount of the punitive damages in order to achieve the purposes of punitive damages – punishment and deterrence. That amount fits easily within this Court's guidelines.

This Court's decisions have held that "due process" entitles Petitioners to a "review" of the jury's punitive damage award in accordance with the guidelines set down in those cases. *State Farm*, 123 S. Ct. at 1520 (citing *Cooper Industries*, 532 U.S. at 424.). In *State Farm*, the Court discussed its second guidepost as articulated in *Gore* – that punitive damages must

have some proportional relation to the compensatory damages. The results in this case are well within the Court's guidelines for proportionality.[9]

Nothing in any of this Court's decisions involving punitive damages requires the imposition of a specific ratio of punitive to compensatory damages. The Court stated that a ratio of punitive damages to compensatory damages should probably involve single digit numbers, but it refused to establish a particular ratio, (no "bright line ratio" (quoting *Gore*) and "no rigid benchmarks," *State Farm*, 123 S. Ct. 1513, *quoting Gore*, 517 U.S. at 582). It stated that a ratio of more that 10:1 would be suspect, but left open the possibility of higher ratios in cases with facts appropriate to a higher ratio. The *State Farm* decision cited *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), with approval, and that case involved a punitive award of 4 times the compensatory damages.

As noted in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (cited as authoritative in *State Farm*), it is difficult if not impossible to create an objective standard for punitive damage awards, based on intra-jurisdictional and inter-jurisdictional comparisons in civil cases. "Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* Of all the Supreme Court cases which have issued opinions on punitive damages, the most closely analogous facts are those in *TXO*, in which this Court held that the "dramatic disparity between the actual damages and the punitive award" was not controlling because the "petitioner set out on a malicious and fraudulent course." *Id.*

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and

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9. Petitioners *inflate the ratio*, repeatedly stating that the ratio is "almost five times compensatory damages. In fact, the compensatory damages in this case total $3,871,680, thus, the ratio of punitive damages to compensatory damages is 3.87:1.

> petitioner's wealth, . . . the award was [not] so "grossly excessive" as to be beyond the power of the State to allow.

Id. So too, in this case, each of those factors were present and mean that the punitive damage award in this case is not grossly excessive.

By their very terms, the orders of both the trial court and the Appellate Division expressly applied the "proportionality" factor to the facts of this case in making their determinations. Pet. Appx. at 4a-7a. Moreover, this guidepost factor was incorporated into the jury instruction, as to which the petitioners did not object. RA2115-16. Thus, not only the reviewing courts but even the jury applied this factor. In this case, the ratio of punitive damages to *actual* damages is *less than* 4:1, and thus the award of punitive damages made by the Appellate Division is well within the proportionality guidelines and does not in any way run afoul of *State Farm.*[10]

In the underlying action, Petitioners prosecuted Mitsuhiro and tied up his capital in baseless litigation in New York for two and one half years. There was ample evidence of malice supporting the jury's verdict, including evidence of the reasons why Petitioners engaged in the litigation: they wanted to call Mitsuhiro a thief; they wanted to oust him from his long-held position with the family businesses; and, they wanted to prevent him from having access to his funds for living and contesting Petitioners' actions in New York and elsewhere. Petitioners spent far more in attorneys' fees than the amount

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10. In considering the "ratio", one must first decide what is being compared. The "single digit" ratio assumes punitive damages compared to actual damages. The proportionality guidepost, however, refers to "*actual or potential* harm suffered by plaintiff." *State Farm*, 123 S. Ct. at 1520. The jury instruction in this case, to which the Petitioners did not object, also required the jurors to consider both *actual and potential harm* caused to the plaintiff when assessing the amount of punitive damages. Resp. Appx. at 6A. It simply makes no logical sense to require the jury to consider both actual and potential harm but then limit the appellate court's review to only the actual harm suffered. In this case, directed as those acts were at one individual, the potential harm was extremely high, both economically and emotionally.

in controversy. As Respondents argued to the Appellate Division, the amount of punitive damages is approximately three times the amount Petitioners willingly spent in legal fees to conduct their malicious litigation. Thus, to be a deterrent to future misconduct, the punitive damages must exceed what Petitioners willingly and maliciously paid.

ISSUE II.

The Appellate Court Properly Considered The Relationship Between The Punitive Damages and Comparable Sanctions

Under the *Gore* and *State Farm* guidelines, "comparability" is the third of the three guideposts to be considered by the reviewing court. Petitioners cannot reasonably claim that this issue was not "considered." The parties fully briefed this issue for the Appellate Division and at oral argument, the Appellate Division judges questioned Petitioners' counsel and scoffed at Petitioners' position – the same as advanced to this Court – that a factually irrelevant administrative penalty might apply. The Appellate Division addressed this issue and, gave this argument the attention they deemed it deserved.

There Is No Applicable Civil Penalty

In most of the punitive damages cases addressed by this Court, a state statute has imposed a penalty for the type of misconduct that was the subject of the lawsuit, e.g., consumer protection statutes or insurance regulations. In this case, however, there is simply no civil or criminal penalty that is applicable or to which a valid comparison may be made. To allow for a valid comparison, Petitioners would need to cite to a civil or criminal penalty for maliciously suing a relative on three continents, in groundless litigation, over many years, tying up his funds, using the litigation to call him a thief, causing him to spend inordinate funds on his defense to regain the possession of money attached and restrained through the improvident bringing and prosecution of a civil action.

The "statutes" relied upon by Petitioners (22 NYCRR §§ 130-1.1 and 130-1.2) are not legislative enactments. Rather, the references are to court rules, which are the New York state

equivalent of Rule 11 of the Federal Rules of Civil Procedure. Like other court rules, the provisions of Rule 130-1 were promulgated by the Office of Court Administration under the authority delegated to the Chief Administrator of the Courts. N.Y. Court Rules of Chief Adm'r, § 130-1.1. Nothing in this Court's decisions suggests that court rules constitute "civil penalties" for purposes of the *Gore* guideposts. In fact, the State of New York has not legislated a penalty that would apply in this case. Moreover, because the underlying case was litigated in the U.S. District Court for the Southern District of New York, to the extent any court rule would apply, it would be Federal Rule 11, not New York's state court rules. Contrary to Petitioners' arguments, Rule 11 allows for the imposition of sanctions without imposing a dollar maximum. Most importantly, Rule 11 sanctions were imposed in this case, in an amount agreed to by the parties, and the agreement specifically allowed Mitsuhiro to pursue a tort claim for malicious prosecution and damages. Given the terms of the agreement, Petitioners cannot now be permitted to rely on the agreement to limit damages, which they expressly agreed could be sought against them in this action. In terms of due process considerations, Petitioners were well aware, at the time they entered into the sanctions agreement, that a malicious prosecution case would be filed and that there was a potential for substantial punitive damages.

If the New York court rules are to be considered for comparison, then the dollar limitation is *not* $10,000 as Petitioners state, but rather the sanction is up to "$10,000 *for any single instance of frivolous conduct.*" 22 NYCRR § 130-1.2. "Frivolous conduct" is defined to include conduct which is without merit; is undertaken for delay, to prolong the case, to harass or with malice; or which asserts false statements of material fact. 22 NYCRR § 130-1.1(c). Given the conduct of the Petitioners in the underlying case and the express findings of Judge Sprizzo at the conclusion of the underlying trial, each day of the underlying proceeding must be deemed to be a separate "instance of frivolous conduct." Calculated over the duration of the underlying litigation, the maximum permissible sanction, not counting costs and attorneys fees,

would be more than $9 million. (That calculation would still not include appropriate sanctions for other instances of malicious conduct on the part of the Petitioners during the course of that case, and there were many.) The comparison is still not valid, however, because the scope of the sanctions imposed by the court rule is much narrower than the factors that Petitioners agreed could be considered by the jury in imposing punitive damages. For example, the court rule only considers "actual" harm caused by the frivolous conduct while the agreed upon jury instruction permitted the jury to consider both "actual and potential" harm caused by the misconduct.

There Are No Comparable Cases

As previously stated, this Court noted in *TXO, supra,* that it is difficult if not impossible to create an objective standard for punitive damage awards "because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* at 443. This precise argument was echoed by the Appellate Division at oral argument.

In the cases cited by Petitioners (Pet. at 11), none is remotely similar to this case, and, thus, comparisons of punitive damages from other cases are not helpful.[11]

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11. The cases cited by the Petitioners at Pet. p. 2, n.2, add nothing to their arguments. First, a review of the facts in those cases quickly shows that none are even remotely similar to the facts in the case at bar. All of the cited cases involve claims asserted against large corporations stemming from cost-saving measures. None of the corporate defendants intentionally directed its energies and resources against one, specific individual with the intent to causing harm. Second, unlike the instant case, all of the cases cited by Petitioners were decided by the State high court *before* this Court's decision in *State Farm* and, thus, it was appropriate for this Court to grant the petition, vacate the ruling and remand for consideration of the impact of the *State Farm* opinion. That procedure, however, would make no sense in this case because the parties fully briefed the *State Farm* decision at both the Appellate Division and the Court of Appeals. Finally, and perhaps most importantly, it is instructive to note that in those cases where the lower court has already reviewed the case *after remand*, in each case, the ratio of compensatory damages to punitive damages, following remand, was *greater than* the ratio allowed by the Appellate Division in the Honzawa case.

The fact that the jury's decision is the highest in New York (as Petitioners claim without citation); or that the amount approved by Judge Gammerman is the highest amount he has ever permitted; or that the Appellate Division, on reflection, increased the amount of the punitive damages Judge Gammerman had upheld, simply comports with the view of Judge Sprizzo that this is the worst case of malicious prosecution he had seen. Similarly, the fact that this malicious prosecution stemmed from a civil case, rather than a criminal case, is an argument which Petitioners made to the jury, but which is inappropriate at this stage of the litigation.

The trial court and the Appellate Division properly analyzed and weighed the facts in accord with the established holdings of this Court in *Gore* and *State Farm*.

ISSUE III.

The Appellate Court Properly Considered The Appropriate Factors In Reviewing The Reprehensibility Of Petitioners' Conduct

Petitioners' claim that the reviewing courts did not consider "reprehensibility" is utterly without merit. Reprehensibility was the central factor in the papers filed by both sides in the post-trial motions and in the Appellate Division. *See, e.g.*, Brief for Respondents at 26-27, 26 note 17; Reply Brief for Respondents at 10-12. By their very terms, the orders of both the trial court and the Appellate Division expressly applied this factor to the facts of this case in making their determination.[12] Pet. Appx. at 6a. This factor

12 This Court's decisions do not dictate that the "reprehensibility" factors are exclusive and preclude consideration of other relevant factors in a particular case. In this case, it was appropriate for the reviewing courts to consider the fact that Hirokuni attacked his own brother, who was also his business partner of 30 years. The reviewing courts also properly considered the fact that Hirokuni's actions stripped Mitsuhiro of his life's work, which, for a successful Japanese businessman was, essentially, social and economic homicide. While the "reprehensibility factors" refer only to "physical" and "economic" harm, in this case, there was obviously a large

(Cont'd)

was also incorporated into the jury instruction, as to which the Petitioners did not object. RA2115-2116. (Resp. Appx. 6A.)

After 30 years of working together as partners, Hirokuni turned against his own his brother. To say that Mitsuhiro was stabbed in the back is something of an understatement. It is incredible that at this stage of the litigation, Petitioners are still arguing the facts, and as they do so they grossly misrepresent the evidence.

Obviously, if the jury awarded more than $2 million in emotional distress damages and loss of consortium damages, then the harm could not possibly be merely economic as Petitioners argue. So too, while Petitioners portray this as a "business dispute," malice and reckless disregard were *elements* of the tort which the jury found to exist and the appellate courts affirmed.

The evidence was clear that Hirokuni and his family members were making a malicious, reprehensible attempt to drive Mitsuhiro from the family business so they could terminate his position in the companies and gain an advantage in the ownership dispute in Japan. Despite Hirokuni's knowledge regarding the true origin of the Hong Kong money, and despite the fact that there were no records connecting Takara International to the Hong Kong money, the Petitioners alleged in the underlying litigation that Mitsuhiro had stolen money that belonged to Takara

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(Cont'd)
component of "emotional harm," and the reviewing courts could properly consider that factor in evaluating reprehensibility. Finally, unlike any other punitive damages case reviewed by this court, Petitioners willingly paid more than $5 million in legal fees to prosecute the underlying action – more than double the amount in dispute. If that were not sufficiently reprehensible, most of the legal fees were incurred *after* Petitioners' lawyers had concluded that there was no evidence to support the claims asserted in the underlying case. Whether these facts are considered as "additional factors" or are fit under the factors already set forth by this Court would not seem matter. What is important is that the reviewing courts considered the entire record, including these facts, when reaching their conclusions.

International. RA2155. At the time the underlying suit was initiated, Takara International had almost no assets and had not been active as a business for nearly a decade. RA1342. The financial statements of Takara International *never* showed accounts or other assets in Hong Kong. RA1628-32, 1095. The Takara International federal and state tax returns never showed any foreign accounts and never showed any income or depreciation from any asset in Hong Kong. RA1629-30.

At the time of the money transactions in Hong Kong in the late 1970s or early 1980s, Hirokuni's sons, Masahiro and Yukihiro, were only 10 or 11 years old. RA1183, 1207. Yet as part of the lawsuits, Yukihiro and Masahiro filed false affidavits — attesting to the allegations about the financial transactions and claiming to have personal knowledge of those transactions — in order convince a judge to attach Mitsuhiro's funds in New York and Liechtenstein. RA2163, 1756-57, 2330, 968, 984, 1066. Their sworn testimony in the affidavits said that Mitsuhiro had stolen money from Hong Kong. Yet Yukihiro subsequently admitted, however, that he had no personal knowledge of the events that underlie the case. RA1252, 1193. Neither Yukihiro, Masahiro, nor any of the Petitioners made any attempt to investigate the claim before filing suit and before seeking the attachment. RA1247. No documents showed that Takara International owned the disputed funds. RA1240, 1244, 1246. Moreover, Yukihiro had met with the family friend in Hong Kong prior to filing suit and learned that the friend disagreed with their claims. RA1217-18, 1184, 1221.

Uncontradicted evidence showed that after Mitsuhiro withdrew his half, Hirokuni withdrew most of the rest, taking the funds in his name and the name of a company he controlled. The money was never put into a Takara International account. RA1586-87. The evidence showed that he essentially gave his half of the money to his sons, who put it in a numbered Austrian account and then a secret Cayman Islands account. RA1586-87.

The irony is that, to justify their own misconduct, Petitioners accused Mitsuhiro of being a thief. Indeed, even as recently as the malicious prosecution trial, Yukihiro still testified that Mitsuhiro had stolen money from Takara International and that act had been the reason for the underlying malicious lawsuit. RA1182. He also testified that Mitsuhiro would have remained in the company except for the commission of his "evil acts." RA1198. Thus, the deceitful, malicious litigation was clearly reprehensible, was clearly designed to harm Mitsuhiro, and the malevolence and the deceit continued right on through the trial of this case and has continued through the appeals. In terms of reprehensibility, the criteria set forth in *State Farm* were appropriately considered in the context of this case.

It is important to note, nonetheless, that the facts in the cases considered by this Court, were quite different from the instant case. In *Gore* and *State Farm*, for example, cases, the facts typically show corporate cost-saving measures gone awry and in no case were those measures directed at one particular individual. Nor did any of this Court's cases involve facts suggesting that the defendant willingly spent millions of dollars persecuting a particular individual, as the Petitioners did in this case. In this case, the Petitioners used their substantial wealth to prosecute groundless litigation, using the litigation to call Mitsuhiro a thief, drive him from the family business and impoverish him. These factors have led all jurists who have reviewed this case to uniformly and unanimously conclude the conduct was reprehensible.

The petition continues to reargue fact-findings already made by the jury and reviewed by the trial court, and the Appellate Division. Petitioners continue to argue that their conduct was not reprehensible: despite Judge Sprizzo's observation at the underlying trial that it was the worst case of malicious litigation he had seen; despite the jury's award of $50,000,000 in punitive damages; despite Justice Gammerman's conclusion that a $10,000,000 award was warranted; and despite the Appellate Division's *de novo*

review, its reiteration of reprehensibility, its reliance on U.S. Supreme Court precedent and its assessment that $15,000,000 is the appropriate amount.

Out Of State Conduct Was Properly Considered

Petitioners' arguments regarding out of state conduct are no less lacking in merit. They attempt to characterize the damage as damage to reputation outside the United States, an utter mischaracterization of the matters in issue. (The out-of-state conduct, to which the Petitioners refer, is described in the briefs filed with the lower courts. *See, e.g.*, Brief for Respondents at 2-5, 11-18, 26-27.) In essence, Hirokuni used the allegations that Mitsuhiro had "embezzled" from the family businesses and the resultant lawsuit filed against him in New York, as a pretext by which they could convince other family members and business and banking associates in Japan and New York that he should be ousted from the family businesses.

Petitioners fail to point out, however, that such "out-of-state evidence" *either* was presented during the trial from the Petitioners' own testimony without objection by their counsel *or* came from documents and testimony elicited by their own counsel. Thus, the issue was not proper, nor was it preserved for appeal at either the Appellate Division or the New York Court of Appeals. Thus, the issue was not preserved for review before this Court. The petition fails to cite any point in the record that would show that Petitioners raised any objection to this evidence.

Even if it were presumed that the issue was preserved for appeal, it would be appropriate to consider such evidence under this Court's holdings. In *State Farm*, this Court expressly *allowed* the consideration of out-of-state conduct as part of the review of punitive damages.

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have

> a nexus to the specific harm suffered by the plaintiff.

State Farm, 123 S. Ct. at 1523.

In this case, there was a direct and undeniable nexus between the malicious prosecution in New York and the Petitioners' actions in Japan. The damages awarded against Petitioners were directly related to the tortious conduct in New York. The portion of the verdict for attorneys' fees was limited to fees incurred by Respondents in defense of the underlying New York action. The portion of the verdict for emotional distress and loss of consortium was, by the express terms of the jury instruction, limited to damages directly related to the malicious prosecution and not activities in Japan. RA2112-14. Petitioners did not object to these instructions and did not request any alternative instructions.

Reprehensibility is the most important of the three guideposts established by this Court for review of punitive damages. That factor was presented to the jury for determination and was thoroughly considered by the trial judge and the Appellate Division. Petitioners demonstrate no reason why this Court should consider it again and, thus, there is no basis for granting the writ.

ISSUE IV.

The Appellate Court Properly Considered Evidence Of Petitioners' Financial Condition In Increasing Punitive Damages

Petitioners still do not seem to grasp that punitive damages were not imposed because Petitioners are wealthy, but rather because Petitioners used their immense wealth to facilitate their malicious purposes.

Petitioners' arguments must be rejected because Petitioners did not preserve this point for appeal in the state court and the evidence of wealth was properly admitted and considered by the reviewing courts.

The Issue Was Not Preserved For Appeal

Petitioners did not preserve this point for an appeal in the state courts, and thus did not preserve the point for appeal to this Court. The petition includes no citations to the record to prove that this issue was preserved for appeal. In fact, Petitioners did not object when the evidence of the value of the Honzawa family business came into evidence and Petitioners approved the jury instruction that indicated wealth could be considered. Petitioners never disputed that there was a legally sufficient basis for the jury's determination on punitive damages.

Summary of Evidence of Wealth

Petitioners' repeated assertions that Respondents did not present evidence of wealth are absolutely false. There was ample evidence of the worth of the companies from which the jury and Appellate Division could, and did, fashion a reasonable amount of punitive damages to punish defendants and deter others from acting in similar fashion. Despite their protestations about the evidence of wealth, Petitioners never submitted any countervailing evidence of Petitioners' immense wealth and did not challenge the evidence when it was presented by Respondents.

At trial, Mitsuhiro testified, without an objection, challenge or contradiction by Petitioners, that the gross asset value of the companies was ¥500 billion, with ¥160 billion in debt. RA1325-27. Thus, the companies had a net value of ¥340 billion or roughly $3.4 billion. The companies had gross annual profits of ¥8.5 billion (or approximately $85 million). RA1321. Testimony was presented that the U.S. companies own four large commercial office buildings in Manhattan, including the former Mobil Oil building, as well as an office building in Chicago and one in Los Angeles. RA1079, 1081, 1087.

Mitsuhiro also testified that in 1995 when he was ousted from the companies, the companies had substantial liquid assets, including bearer bonds worth $50 million and the

proceeds of a 150 Million Swiss Franc loan, which gave the companies access to ready cash. RA1366, 1507-09. Though Respondents dispute the claim, Hirokuni purports to be the sole owner of these businesses. *See*, Petition at ii.

Thus, the punitive damages award is approximately one half of one percent of Hirokuni's and the companies' net worth and a small percentage of the companies' annual profits. That is not excessive punishment.

In addition to evidence of net worth, the jury heard that Petitioners had spent approximately $5 million (and probably closer to $7 million) for legal fees in prosecuting the underlying Takara International case. Most of this money was spent *after* Petitioners' counsel had filed papers in the Takara International case admitting that Petitioners could not prevail in the action.

Evidence of Wealth Was Properly Considered By Reviewing Courts

The arguments Petitioners make to this Court merely repeat those made to, and rejected by, the lower courts. The trial court and the Appellate Division both agreed that there was sufficient competent evidence of the Petitioners' wealth to be considered by the jury in assessing the appropriate amount of punitive damages. Petitioners falsely claim that Justice Gammerman found that no evidence of wealth had been presented, but his decision clearly stated that "there was testimony concerning the substantial assets of defendants in 1995, when the underlying litigation was initiated, . . ." with a footnote which cites the same pages of the trial transcript (RA1326-27 and RA1321) referenced above.

Contrary to Petitioners' arguments, this Court's opinion in *State Farm* did not prohibit consideration of a defendant's wealth as a factor in assessing punitive damages, particularly where the defendants did not object to the introduction and consideration of the evidence. Rather, in *State Farm*, this Court quoted Justice Breyer's concurring

opinion in *Gore*, noting that the use of wealth in determining punitive damages is *not* "unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility' to constrain significantly an award that purports to punish a defendant's conduct." *State Farm*, 126 S. Ct. at 1525. In this instance, the Appellate Division specifically noted that Petitioners' conduct was reprehensible, and thus, the Petitioners' wealth was not substituted for "reprehensibility."

The Appellate Division noted that the Petitioners' wealth allowed them to use millions of dollars (between $5 million and $7 million) to pursue malicious litigation against his brother to gain advantage in the family business. It was *this evidence* to which the Appellate Division referred as one reason the amount of the punitive damages should be increased to $15 million. (Plaintiffs had argued that punitive damages in an amount three times the legal fees voluntarily incurred by Petitioners were a reasonable amount.) Stated simply, if a defendant is sufficiently wealthy that $5 million can be thrown away on a case that cannot be won, it is obvious that a punitive damages amount must be significantly higher in order to make the defendant notice the punishment. Finding that the purposes of punitive damages – punishment and deterrence – were not satisfied by the trial court's award, the Appellate Division increased the award to $15 million – an amount 3 times what the Petitioners wasted on litigation costs and, still, only 30% of the amount the jury thought was appropriate.

Given the failure of the Petitioners to object to the introduction of evidence concerning the wealth of the Petitioners, and given the failure of the Petitioners to object to the jury instruction which permitted consideration of the Petitioners' wealth in assessing punitive damages and considering the facts of this case as reviewed by the lower courts, the writ of certiorari should not be granted on this basis.

CONCLUSION

The underlying facts of this case have now been heard by two experienced trial judges – Judge John Sprizzo in the U.S. District Court and Justice Ira Gammerman, in the New York Supreme Court – and have been reviewed by five members of the Appellate Division panel, and examined on two occasions by the Court of Appeals. All have concluded that, under the guidelines of this Court, these facts constitute an extreme case of malicious prosecution and warrant substantial punitive damages.

In their briefs filed with the trial judge and with the Appellate Division, Petitioners cast the verdict as the product of an "inflamed" or a "runaway" jury (Brief for Petitioners, RA2504) and they continued to make the same arguments to the Court of Appeals and to this Court, now claiming the jury was "ignited." Petition at 5. This argument ignores an obvious fact: every judge who has reviewed this case has come to the same conclusion, as did the jury, that Petitioners' actions in filing and prosecuting meritless litigation against a family member for more than two years were reprehensible.

Contrary to Petitioners' claim that the Appellate Division did not consider this Court's guidelines, in fact, the Appellate Division reviewed the entire record and concluded that, given the amount of money spent by the Petitioners on attorneys' fees in the underlying litigation allowed by the Petitioners' enormous wealth, $15 million in punitive damages was consistent with this Court's due process guidelines and necessary to effectuate the purpose of punishment and deterrence.

To this day, Petitioners still have not apologized or shown any remorse for their conduct. During the malicious prosecution trial, Petitioners continued to argue that Mitsuhiro was a thief, continued to claim both that the funds were Takara International assets and that it was proper for them to have so claimed, despite all rational evidence to

the contrary. They even attempt in the current petition to argue that the underlying case was based on a "belief" that funds of Takara International, Inc. had been misappropriated and they continue to refer to the disputed money as "corporate funds," despite full knowledge of the evidence to the contrary. Most importantly, they still have failed to acknowledge that the litigation was part of an orchestrated ouster of Mitsuhiro from the family business so that Hirokuni and his sons could push their uncle out of the family businesses.

Petitioners cite no compelling reason why this Court should entertain the appeal, except that Petitioners seem to desire this Court to establish itself as a substitute jury and as a substitute for the lower appellate courts, thus causing this Court to become the final fact finder for every disgruntled punitive damage defendant.

Wherefore, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of April 2004.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-14 Mo. No. 109

Mitsuhiro Honzawa, *et al.*,

Respondents,

V.

Hirokuni Honzawa, *et al.*,

Appellants,

Yoshiko Honzawa, *et al.*,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, be and the same hereby is dismissed upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

/STUART M. COHEN/
Stuart M. Cohen
Clerk of the Clerk

SUPREME COURT OF THE STATE OF NEW YORK
County of New York: Trial Term Part 27

Index No. 98-602983
March 20, 2002

Mitsuhiro Honzawa and Yukiko Honzawa,

Plaintiffs,

– against –

Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation,

Defendants.

Before:

Honorable Ira Gammerman, Justice.
and a Jury

[RA2111]

COURT'S CHARGE

* * *

We now have two items of damage relating to noneconomic claims. If a lawsuit is started maliciously without probable cause, and under the circumstances of this case since there was an attachment, and since the lawsuit ended in favor of [RA2112] the party who was sued, that party has the right to recover not only the legal fees that were incurred or expended in defense of that lawsuit, but the emotional injury for emotional distress, which I called emotional injury caused by the institution of the lawsuit.

The plaintiff, Mitsuhiro Honzawa, testified as to being - as to his emotional reaction. You have to determine, because we have to distinguish between emotional distress resulting from the estrangement from the family, which apparently began six months or so before this lawsuit started, and emotional distress caused by economic reversals which are unrelated to the lawsuit. Economic reversals based on the estrangement from the family and this litigation and dispute that apparently is being litigated in a number of Japanese actions related to the entitlement to the two brothers to various aspects of the business.

That is not part of this case, and if you can make a distinction from the testimony of Mitsuhiro Honzawa, and I guess his wife testified as well concerning that, if you can make a distinction concerning the impact of this lawsuit, the underlying lawsuit and the emotional distress that caused, and isolate that from the emotional distress caused by the family estrangement and economic reversals, then you [RA2113] make an award for an amount you think is fair and reasonable to compensate him for that emotional distress; if you conclude that the evidence in the case justifies such award and enables you to make such calculation.

* * *

[RA2114] Now, in addition to awarding damages that we call compensatory damages, the plaintiffs are seeking what we call punitive damages. And you are permitted to – you are not required to obviously, but you are permitted in case in which you conclude, because if you're answering these questions, you conclude that there was action taken maliciously, that is, action taken by ill will or action taken with reckless disregard of the rights of Mitsuhiro Honzawa, you can, if you wish, award punitive damages.

[RA2115] The purpose of the punitive damages is not to compensate for injury, it is to punish for this malicious conduct. And therefore, to discourage others, and the defendant, from acting in a similar way.

An act is wanton and reckless when it's done in a way and under such circumstances as to show a conscious indifference and utter disregard of its effect upon the rights of another person.

An act is malicious when it's done deliberately with the knowledge of the rights of another person with the intent to interfere with those rights. And this is what is alleged in the underlying case, the case for malicious prosecution.

And if you answered question one in the affirmative, you have already concluded there was malice.

If you conclude under all the evidence in this case that punitive damages should be awarded, you answer the question yes. If you conclude that punitive damages are not to be awarded, you answer the question no. If you answer the question no, you skip the next question.

If you answer the question yes, question seven asks you to set forth the amount of the punitive [RA2116] damages. And there is no exact rule by which you decide that amount. You may award punitive damages in such an amount as, in

your judgment and discretion, you find will punish the defendant[s] for what they did and will deter them and others from acting in a similar way.

In arriving in a decision with respect to the amount of punitive damages, you can consider the following factors: The nature and reprehensibility of what was done by defendants, that would include the character of the wrongdoing, how long it went on, the defendants' awareness of what harm the conduct caused, and was likely to cause, the actual and potential harm that was created by the defendants' conduct.

The amount of punitive damages should bear a reasonable relationship not only to the actual harm that the plaintiff suffered, or may suffer in the future, but also the potential harm that was created by that conduct that you can consider, of course, the defendants' financial condition, and the impact that your punitive damage award will have on the defendant or the defendants.

Now, assuming you are awarding punitive damages, you indicate that amount with respect to question seven.

New York County Clerk's Index No. 98-602983

COURT OF APPEALS
State of New York

Mitsuhiro Honzawa and Yukiko Honzawa,

PLAINTIFFS-RESPONDENTS,

— vs. —

Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation

DEFENDANTS-APPELLANTS.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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APPENDIX A

SUMMARY OF FACTS SHOWING LACK OF PROBABLE CAUSE

There was ample evidence to support the jury's finding that the underlying case was initiated and continued without probable cause. In their motion, petitioners repeat many of the same arguments they made to the jury during the trial, which were the same arguments that were made to, and rejected by the trial court and the Appellate Division in both appeals. As Justice Gammerman concluded, "it seems to me there was clearly a factual issue and there was certainly sufficient evidence for the jury to answer [Question 1 on the verdict form] as it did." RA2151.

Both of the Honzawa brothers testified that they took considerable sums of cash (Japanese Yen) to Hong Kong in the late 1970s or early 1980s. This was a stipulated fact during the underlying trial. Mitsuhiro testified that he and his brother each took personal money, in the form of cash, from Tokyo to Hong Kong in the 1970s.

> Q. Mr. Honzawa, can you explain to the jury how the money got to Hong Kong.
>
> A. It's cash. And my brother and I took it to Hong Kong as cash, and we both actually took it there physically.
>
> The Court: When?
>
> A. It was during the '70s.
>
> Q. Whose money was it that was taken?
>
> A. It was money belonging to both of us.

Q. Personal money?

A. Yes.

* * *

Q. Did this money have any connection whatsoever to Takara International?

A. Not at all.

Q. Who took the money to Hong Kong?

A. Primarily myself. I actually took it over there five or six times and Hirokuni actually carried it over maybe two or three times.

RA1300-01, 1305. Once the money arrived in Hong Kong, it was deposited to an interest bearing account at Tokai (Toke) Bank. RA1306.

Without any supporting citation, petitioners continue to claim that Mitsuhiro testified that the money he withdrew from the Hong Kong bank account in August 1995 was "at least in part, deposited by Takara International." (Petitioners' Motion at 11) This claim, which they made to the jury, the trial court and the Appellate Division, was *never* supported by any evidence. In their brief to the Appellate Division, petitioners made this same claim and included a citation, but the page of the transcript cited by petitioners' brief did not in any manner support their position. (Similarly, the claim that the petitioners' position was supported by their expert witness is false. The petitioners' testimony actually supported Plaintiffs' position. See summary of testimony set forth below.)

It is a gross misrepresentation of the record for petitioners to claim, as they still do in the instant motion, that somehow the underlying claim was not malicious because Hirokuni believed that the money in the Hong Kong account was an asset of Takara International. There was *no* evidence to support this assertion and, in fact, all of the evidence is to the contrary. Hirokuni admitted that he was aware of cash transactions going directly from Tokyo to Hong Kong. RA1570. "In cash, I gave him about 40 million or 50 million yen in the beginning of the 80s." RA1569-70. This occurred two or three times and involved 30 or 40 million yen each time. RA1570. Hirokuni claims he never transported the money himself, but "gave it to [Mitsuhiro] to transport for [him]. RA1571. Mitsuhiro took the cash to Hong Kong with Hirokuni's knowledge. RA1571. According to Hirokuni, the cash transfers were not a secret. RA1573.

> Q. What happened to the cash?
>
> A. I asked him to take it and to send it. After that, I don't know. After that, he's the one that did everything, so I am not going to — I didn't want to ask him too deeply about it.

RA1575. But, Hirokuni was familiar with deposits of the cash to the Tokai (Toke) Bank in the name of Chen (RA1571) and when asked, "Where is the money now?" admitted that it was from these cash accounts that Mitsuhiro had transferred his money to the Bank in Liechtenstein account in August 1995. RA1576.

Mitsuhiro took half of the funds in Hong Kong because it was his personal money. RA1453. There was no connection between Takara International and the cash that the Honzawa brothers took to Hong Kong. RA1343. Mitsuhiro had the financial ability to have this amount of money in Hong Kong, because he was receiving an annual salary of approximately $550,000 plus benefits, including a home, a car and travel expenses. RA1303-04.

The Honzawas used some of the cash and interest earned on the cash to purchase certain shops in Hong Kong. RA1345. The shops in Hong Kong were held in the name of Mr. Chen, but were owned by the three men (Hirokuni, Mitsuhiro and Chen) in the form of a partnership by the name of Hang Wing Investments. RA1343. There was no connection between Takara International and the shops. RA1347. The rent receipts from the shops went to an interest account in Hong Kong. RA1345.

Hirokuni testified that whoever owns the shops owns rent received from the shops (RA1560) and that the shops were owned by Hang Wing. RA1561, 1590. Takara International did not have an ownership interest in Hang Wing. RA1589. Thus, both of the Honzawa brothers admitted that the cash that they had taken to Hong Kong and rent derived from the shops, had no connection to Takara International. (As will be shown in the summary of testimony from defendant's expert accountant, the cash, interest on the cash, plus rent received from the shops, totaled more than $5 million and Mitsuhiro transferred less than half of that in August 1995.)

None of the bank accounts in Hong Kong were in the name of Takara International. RA1358. Only one Hong Kong bank account had been in the name of

Takara International. RA1349. That account had been used only for the "circle loan" transaction on one day in November 1978. RA1349. See Note 2, *supra*. There had been no other transaction in the Takara International account. RA1351. The obviousness of this fact had been highlighted by Judge Gammerman who stated as a fact during the trial, to which the petitioners did not object, that the only transaction involving a Takara International account occurred on November 10, 1978. RA1495. That transaction left only a few hundred dollars in Hong Kong and could not have been the source of the funds transferred by Mitsuhiro in August 1995.

Hirokuni was well aware that the funds in Hong Kong could not have been assets of Takara International. Hirokuni looked at the bankbooks when he was in Hong Kong (RA1353) and he discussed the contents of the bankbooks with Mitsuhiro. RA1353, 1359. Hirokuni never had problems obtaining records from Mr. Chen. RA1360. Hirokuni never indicated that the money in Hong Kong was an asset of Takara International (RA1359) nor did he ever indicate that the money belonged to one of the other family companies. RA1359.

Hirokuni was also well aware that Takara International had no assets in Hong Kong. Each year Arthur Anderson prepared Takara International financial statements (RA1335) but none showed any assets in Hong Kong. The Takara International financial records were shared equally with Hirokuni (RA1337) and Hirokuni reviewed the financial statements of the U.S. companies. RA1337. As of 1990, Takara International had almost no assets (RA1342) and no ongoing business. RA1342.

Not only did Hirokuni know of the origin of the Hong Kong funds, he also knew that the funds had no connection with Takara International. Hirokuni had full access to the Takara International financial records, the accounting ledgers, tax records, financial statements and bank statements. RA1696. Hirokuni knew in advance that the Takara International case was going to be filed in NY. RA1711. Hirokuni authorized the lawyers in NY to bring suit. RA1731. The action was taken on Hirokuni's authority (RA1711) and he did so on behalf of the U.S. companies. RA1711. Hirokuni knew when the Takara International case started that only he, Mitsuhiro and Chen had knowledge of the underlying source of the funds in Hong Kong. RA1712. Despite these facts, Hirokuni did not communicate or provide information to the U.S. lawyers in the Takara International before suit was filed. RA1712.

Before commencing the Takara International case, neither Hirokuni nor anyone else spoke with Mitsuhiro to determine the origin of the funds in Hong Kong and/or to determine if those funds had any connection with Takara International. RA1360, 1363. The fact that Takara International had no assets in Hong Kong was well known to several long time Takara International employees.[13]

In addition to the cash taken to Hong Kong, Hirokuni was aware of the interest earned on that money. Hirokuni met with Chen on occasion and when they met he had an opportunity to review Hong Kong bank records. RA1695. Hirokuni reviewed memoranda prepared by Chen regarding the Hong Kong accounts. RA1729. Based on this information, Hirokuni believed that there was $10 million in the Hong Kong accounts. RA1730. In his absence, Hirokuni admitted that he could have sent someone to review the Hong Kong records for him. RA1695, 1696.

In October 1995, before the Takara International case was filed, Hirokuni, along with his wife and Yukihiro, met with Chen in Hong Kong for several days. Each meeting lasted several hours. RA1693-96. During these meetings, they reviewed the bank documents and Yukihiro calculated with Chen the balance in the Hong Kong accounts. RA1695. From these meetings, Hirokuni and Yukihiro necessarily knew that Takara International had no accounts in Hong Kong and they could trace the origin of the funds to the cash transfers, interest earned and rent received from the shops.

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13. It was stipulated that "Elaine Lipka acted as bookkeeper for Takara International from 1973 to [1995]. She has been and currently is a trusted employee. Hirokuni Honzawa could not identify anyone with greater knowledge of Takara International's financial records." RA2229. "Elaine Lipka provided financial information regarding Takara International to the accountants, Arthur Andersen, LLP, who prepared the corporate income tax returns and financial statements on a regular basis." RA2229. The long-time general manager, Takeshi Kato, testified that he was never aware of any Takara International assets in Hong Kong. RA1095.

Yukihiro handled the discussions about how to proceed with the Takara International case. RA1713. Hirokuni never asked the US lawyers about the likelihood of success. RA1714. Nor did he asked for or receive an estimate of legal fees which would likely be incurred. RA1714. Hirokuni provided no instructions to Yukihiro for payment of fees (RA1715, 1716) and had no discussion with Yukihiro or anyone else about legal fees. RA1715-16.

Yukihiro admitted that, contrary to his affidavit which was the basis for obtaining the attachment, he had no personal knowledge the Hong Kong accounts. RA1252. The only information he received regarding the Hong Kong money came from Mr. Chen or Hirokuni. RA1193. He also had no personal knowledge of the cash transfers to Hong Kong; of course he would have been only 9 or 10 years old at the time. RA1183. (Yukihiro's date of birth is December 1, 1969. RA1207) As Judge Gammerman said during the trial *without objection or correction by the petitioners*: "What he knows, he knows what other people told him." RA1252.

Yukihiro attended the October 1995 meeting with Chen in Hong Kong (RA1217) for the specific purpose of discussing the money Mitsuhiro had transferred. RA1217. At that meeting, Yukihiro admitted that he had learned of the cash transactions from Tokyo to Hong Kong, which his father had participated in - several months before suit was filed in New York. RA1184. He also admitted that he was aware the accounts from which Mitsuhiro had transferred the funds were in the name of Chen, not Takara International. RA1228. Although several letters were generated by Mr. Chen at, and following, these meetings, Yukihiro admitted that a second letter from Mr. Chen was required because the first letter Chen had signed said that the money transferred by Mitsuhiro were "private funds." RA1221.

Following the meetings with Chen, Yukihiro was aware that the total money remaining in Hong Kong, *after*

Mitsuhiro had transferred his share, was $2.4 million.[14] RA1218. At the time the NY case was filed, Yukihiro was not aware of Toppu or Hang Wing (RA1192-93) and did not know who owned Toppu or Hang Wing. RA1193. Thus, even if he had been aware of the rent received from the shops or the loan payments by Takara International to Toppu, Yukihiro had no basis for connecting those transactions to Takara International.

Yukihiro admitted that the only Takara International cash account in 1995 was in a California bank and contained less than $100,000. RA1238. Yukihiro was not aware of any documents showing that the Hong Kong funds belonged to Takara International. RA1244. He was aware that the Takara International financial statements showed no assets in Hong Kong (RA1246) and he was aware that the Takara International U.S. tax returns did not show any Hong Kong income, even though such disclosure would have been required. RA1240. Despite knowing all of this information that was contrary to the allegations in the Takara International case, Yukihiro made no effort to speak with Elaine Lipka, Takeshi Kato or the accountants at Arthur Anderson before filing the lawsuit. RA1247.

At the malicious prosecution trial, petitioners called an expert witness, Mr. Donald Martin, presumably with the intention of confusing the judge and/or the jury with

14. This remaining balance, which petitioners claimed to be owned by Takara International, was never transferred to a Takara International account. RA1225. In early 1996, after Hirokuni had initiated the Takara International suit against Mitsuhiro, Hirokuni withdrew his half of the funds, but despite the allegations that the money was an asset of Takara International, the money Hirokuni withdrew was made payable to Hirokuni personally and to a company he formed. RA1225. Yukihiro then transferred these funds to a numbered account in Austria, which he had opened in his own name, and then transferred the money to a Cayman Islands account. RA1249-51. The money was never placed in a bank account in the name of Takara International. RA1225. No bank or tax records in the name of Takara International reflected the receipt of the money (RA1226) and no effort was made to pay past due taxes on, what they claimed to be, Hong Kong income. RA1241.

accounting sleight of hand. What occurred on cross-examination was that Mr. Martin unequivocally supported the *plaintiffs'* position. Mr. Martin testified that $2,040,000 in cash was taken by Hirokuni and Mitsuhiro from Japan to Hong Kong in the late 1970's and early 1980's.[15] RA1950. He further testified that Mitsuhiro transferred $2,272,000 in August 1995. RA1957:16-18. The total amount of cash in the Hong Kong accounts at that time – including all principal, interest, and rent receipts – was $7,286,000. RA1957:12-15. Of this total, the cash principal taken to Hong Kong plus interest earned on that cash totaled $4,296,310 in August 1995. RA1959:9-22. That amount, which indisputably was known to Hirokuni and did not have any connection to Takara International, was more than the total amount withdrawn by the Honzawa brothers. RA1959:23-25.

In addition to the $4,296,310, there was an additional $1,141,000 in rent receipts from the shops purchased by the Honzawas (RA1961:4-9) and, as to which, it was stipulated there was no connection to Takara International. RA1926-27. Thus, the cash, interest earned on the cash plus rent receipts totaled $5,437,310, (RA1957), and Mitsuhiro actually withdrew less than his fair share. Hirokuni knew that this money had no connection whatsoever to Takara International and, for that reason, transfer of these funds by Mitsuhiro could not have possibly served as evidence of probable cause.

Defendants continue to argue that there was some evidentiary basis for Hirokuni to believe that the money transferred by Mitsuhiro originated from Takara International. This argument is demonstrably false and there was *no* evidence presented at trial to support this assertion. Moreover, even if the assertion were true, it is legally irrelevant because it stands the legal standard on its head.

---

15. On direct examination, Mr. Martin and defense counsel referred to these sums as "undetermined as to sources," (RA1950) and at one point said, "I don't what the sources of those monies were." (RA1911) On cross-examination, however, he admitted the source was the cash taken from Tokyo to Hong Kong by Mitsuhiro and Hirokuni. RA1950.

(3)

No. 03-1365

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

—against—

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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INTRODUCTION

This case involves the unique circumstance of an appellate court *increasing* a punitive damages award from $10 million to $15 million without making an effort to "ensure both reasonableness and proportionality." Although, as Respondents assert, the constitutionality of the punitive damages award has been raised and fully briefed throughout the appellate process (Res. Br. at 8, 9, 10, 14, 17), the Supreme Court of the State of New York, Appellate Division, First Department dispensed with the "[e]xacting appellate review" this Court requires in evaluating punitive damages awards. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1525-26 (2003). The Appellate Division instead relied upon the Petitioners' purported "immense wealth" as a substitute for the proportionality and reasonableness "guideposts" this Court confirmed were the mandated elements of review in *State Farm*. (Pet. App. at 6a.) The Petitioners' purported "immense wealth" is not only baseless but also *irrelevant* in determining reasonableness or proportionality and, as this Court made clear in *State Farm*, "cannot justify an otherwise unconstitutional punitive damages award." 123 S. Ct. at 1525. The Appellate Division's refusal to apply the mandated due process guideposts and its reliance upon wealth as a surrogate for exacting *de novo* review constitutes the fundamental constitutional error that compels granting the requested writ of certiorari.

Respondents attempt to obscure the Appellate Division's fundamental error by launching into pages upon pages of purported "evidence" that the underlying action upon which this malicious prosecution action was based was part of an effort to dislodge Mitsuhiro from alleged ownership of certain Japanese companies. (*E.g.*, Res. Br. at 2, 4, 20-23.) It is this very claim to "ownership" upon

which Mitsuhiro bases his argument in favor of excessive punitive damages that the Supreme Court of Japan ruled *false*, albeit after the trial in this action was completed. More importantly, the sole "evidence" that is relevant for purposes of this appeal in the first instance is the Appellate Division's decision, which is *silent* concerning whether its punitive damages award is proportional to compensatory damages, *silent* concerning whether its punitive damages award is fair compared to other similar awards and penalties, and *silent* concerning the elements of reprehensibility this Court "instructed" the lower courts to apply in *State Farm*. 123 S. Ct. at 1521.

Because the Appellate Division failed to conduct the *de novo* "guidepost" review mandated by *State Farm*, and because the $15 million punitive damages award is excessive, as detailed in the Petition, the Court should grant the requested writ of certiorari.

THE ORDER APPEALED FROM IS FINAL

Respondents contest the Court's jurisdiction on the ground that at the time this Petition was filed from a final order dismissing Petitioner's appeal to New York State's highest court, the Petitioner had filed a request for permission to appeal to the same court and the request was still pending. (Res. Br. at 11.) Respondents' assertion is incorrect and should be rejected.

Under the Civil Practice Law & Rules of the State of New York, appeals to New York's Court of Appeals concerning substantial constitutional questions may proceed in two manners. An appeal may be filed as of right; and an appeal may proceed with the Court of Appeals' permission. N.Y.C.P.L.R. 5601, 5602. Here, Petitioners filed an appeal as of right to the Court of Appeals on the

ground that the Appellate Division's punitive damages award was unconstitutional under the Fourteenth Amendment. (Pet. App. 37a.) The Court of Appeals dismissed the appeal on the ground that the punitive damages award did not constitute a "substantial" constitutional question. (Pet. App. 1a.) The order dismissing the appeal was a final order upon which this Court may now exercise jurisdiction. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 138 (1986) ("In the absence of positive assurance to the contrary from the [state's highest court], we consider that court's dismissal of [Petitioner's] appeal to be a decision on the merits.").

Furthermore, while the motion for permission to appeal to the Court of Appeals on both state common law and constitutional issues was pending at the time the present Petition was filed, the motion for leave has since been denied. (Res. App. 1A.) No further proceedings concerning the merits of this action or the matters subject to the Petition are pending in the Court of Appeals. Because events subsequent to the Petition have rendered any question concerning finality resolved, the Court has jurisdiction to hear the present appeal. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 & n.4 (1980) (finality found where post-petition events rendered the judgment on appeal final and where "no federal question, except that which we are now asked to resolve, remains in the litigation").

RESPONSE TO RESPONDENTS' OPPOSITION

1. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001), this Court made it clear that a *de novo* appellate review of punitive damages awards was a required component to ensure due process. *De novo* review in the context of the trial court's punitive damages award required the Appellate

Division to consider *each* of the guideposts declared mandatory in *State Farm* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The only "evidence" to which the Respondents point that the Appellate Division "took a fresh look" at punitive damages in this action is the fact that the constitutionality of punitive damages was a major component of the parties' briefs on appeal and the matter was "fully aired." (*See* Res. Br. at 1, 8, 14.) Nothing in the Appellate Division's decision even hints that the court considered the proportionality and fairness elements mandated in *State Farm* and *BMW* in increasing punitive damages; indeed, Respondents' conclusion the Appellate Division applied the due process guideposts simply because they appeared in the parties' briefs is speculative.[1]

2. Rather, the principal factor to which the Appellate Division pointed in determining to increase punitive damages was the Respondents' purported wealth—a factor objectionable for the reasons set forth in the Petition. (Pet. App. at 6a.) Respondents contend that the Appellate Division's consideration of wealth is irrelevant because "Petitioners did not preserve this point for appeal in the state courts . . . ." (Res. App. at 26.) To the contrary, Respondents raised the Petitioner's alleged financial condition as a basis upon which the Appellate Division should increase punitive damages in their briefs on appeal, to which Petitioners responded and objected

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[1] The purpose of *de novo* review is not only to protect the party subject to punitive damages from a "decisionmaker's caprice" but also to ensure uniformity in the law and notice to citizens of the conduct adjudged appropriate for a punitive sanction. *Cooper*, 532 U.S. at 436. Setting forth the bases for determining whether a punitive damages award comports with due process is an important appellate component of *de novo* review. The Appellate Division left the parties to speculate whether it considered any of the guideposts declared in *BMW* and *State Farm*.

in the Appellate Division under *State Farm*. (Pet. App. at 41a.) Respondents themselves also concede that the issue of the Petitioners' wealth as a basis upon which an appellate court may increase punitive damages was raised on appeal in the Court of Appeals. (Res. Br. at 10.) Moreover, even had Petitioners failed to raise the impropriety of basing punitive damages upon wealth in the state courts—which they did not—the fact that the Appellate Division addressed and resolved the issue suffices to preserve it for this Court's review. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (declaring "the elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided") (quotation omitted).

In any event, Respondents are unable to point to a single shred of evidence showing the Petitioners' alleged financial condition at the time of the jury's verdict—underscoring the arbitrary manner by which the Appellate Division arrived at its decision to increase punitive damages. The purported and baseless "evidence" of wealth on which Mitsuhiro relies was rejected by the trial court. (Res. Br. at 27.) Justice Gammerman was correct in concluding not to consider wealth as a material factor in determining punitive damages as a matter of evidence because Mitsuhiro *failed* "to submit evidence of defendants' current financial status." (Pet. App. 30a.) The Appellate Division thus ignored the trial court's factual finding that no evidence of the Petitioner's alleged wealth had been submitted, and substituted its own speculation, without evidence and contrary to the evidence and the law as declared in *State Farm*.

Respondents next attempt to downplay the Appellate Division's reliance upon wealth by spinning it as a statement that the Petitioners could afford the amount of lit-

igation costs involved in the underlying action. (Res. Br. at 27-28.) Respondents' interpretation is contrary to the Appellate Division's decision, which states that the "immense value" of the businesses was a principal factor in increasing punitive damages. (Pet. App. at 6a.) The Appellate Division's reliance upon alleged wealth in this manner was directly contrary to *State Farm*.

Respondents also point to the jury instruction which incorporated components of the due process guideposts set forth in *BMW* as "evidence" that the same guideposts were applied at the appellate level. (Res. Br. at 7, 16.) Whether the jury considered some guideposts components is irrelevant; *State Farm*, *BMW*, and *Cooper* require appellate courts to apply the review guideposts to ensure against the arbitrary caprice of the jury. Here, the Appellate Division failed in its constitutional obligation.

3. Respondents next contend that "by their very terms, the orders of both the trial court and the Appellate Division expressly applied the 'proportionality' factor to the facts of this case in making their determinations." (Res. Br. at 16.) Absent from Respondents' opposition, however, is the point in the Appellate Division's decision that the "proportionality factor" was applied, and with good reason. As explained above, the Appellate Division's decision is *silent* concerning proportionality.

Proportionality is a critical issue in this action that was ignored by the Appellate Division. Although Respondents are correct that this Court has never established a bright line rule of proportionality to be applied in *all* punitive damages cases, the Court has made it clear that where compensatory damages are substantial a lesser ratio, "*perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). Respondents ignore this guideline in the same manner as the Appellate Division. Because

compensatory damages in this action are substantial, the punitive damages award well exceeds the outermost limits of due process particularly where, as here the Appellate Division failed to apply any of the other guideposts necessary to ensure due process.

4. Respondents next assert that because the parties "fully briefed" comparable sanctions, the Appellate Division considered comparable sanctions in increasing punitive damages. Absent again from Respondents' opposition, however, is the point in the Appellate Division's decision that the "comparability" factor was applied. Indeed, as explained above, the Appellate Division's decision is *silent* concerning comparability.[2]

The Appellate Division's silence demonstrates the error of Respondents' understanding that "all of the judges" considered the factors set forth in *BMW* and *State Farm* faulty. (Res. Br. at 17.) At one point, the Respondents even contend that the "trial judge described [the underlying action] as one of the worst cases of malicious litigation he had ever seen." (Res. Br. at 1.) The only trial level judges at issue here are New York State Supreme Court Justice Gammerman and Southern District of New York Judge Sprizzo. Justice Gammerman made no such assertion in his decision to reduce punitive damages. (*See* Pet. App. at 18a.) And the issue of malicious prosecution was not even before Judge Sprizzo; rather, Judge Sprizzo commented that damages were warranted under state law relating to an "improvident" attachment, and potentially sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Contrary to

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[2] Respondents misconstrue 22 NYCRR § 130-1.1(c) in their opposition. (Res. Br. at 18.) That Court Rule applies a sanction for the very conduct of which the Petitioners were accused—an action commenced without probable cause. Section 130-1.1(c) does not provide for daily maximum sanctions as Respondents suggest.